IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

STATES OF WEST VIRGINIA, **NORTH DAKOTA**, **GEORGIA**, and **IOWA**, *et al.*, Plaintiffs, v. **U.S. ENVIRONMENTAL PROTECTION AGENCY**, e*t al.*, Defendants.	Case No. 3:23-cv-00032-DLH-ARS Hon. Daniel L. Hovland

PLAINTIFF STATES' RESPONSE TO APPLICANT-DEFENDANT-INTERVENORS' MOTION TO ACCELERATE BRIEFING AND EXPEDITE CONSIDERATION OF MOTION TO INTERVENE

The Plaintiff States offer just two short points on the Tribes' request to rush the process for deciding their motion to intervene.

First, the Tribes have not provided any specific reason why the Court must decide their motion to intervene before the Court decides the Plaintiff States' motion for preliminary injunction. Nor have the Tribes explained why their motion should be fast-tracked ahead of the Proposed Business Intervenors' motion, which was filed two weeks earlier. ECF 54. In this motion to expedite, the Tribes talk broadly about the "sovereign interests" that they say the Final Rule implicates. ECF 96-1 at 4. But the Tribes do not explain—in this motion, their response to the Plaintiff States' motion to strike, or the Tribes' proposed opposition to the motion for preliminary injunction—why these sovereign interests are endangered *by a preliminary injunction*. A preliminary injunction, after all, "merely … preserve[s] the relative positions of the parties until

a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The Plaintiff States are not asking the Court to "narrow[] the scope of Clean Water Act jurisdiction" from what it is today, as the Tribes suggest. ECF 96-1 at 4. And while the Tribes are right that the preliminary injunction presents an "important decision" in that it could prevent serious harm to the States, they are wrong to think that the decision "will affect the rest of the case." *Id.* "[F]indings of fact and conclusions of law made by a court granting a preliminary injunction are not binding." *SEC v. Zahareas*, 272 F.3d 1102, 1105 (8th Cir. 2001). And "[a]t this preliminary stage," the court does not decide who "will ultimately win." *Nokota Horse Conservancy, Inc. v. Bernhardt*, 666 F. Supp. 2d 1073, 1078 (D.N.D. 2009). So if the Tribes are right that they have substantial interests that justify intervention, then they will have a full opportunity to protect those interests when the case moves forward.

Second, the Tribes are mistaken in thinking that "the Plaintiff States will not be harmed nor prejudiced by the Tribes' requested schedule." ECF 96-1 at 5. It may be that the Tribes' schedule could allow the *motion to intervene* to be decided hours before the Final Rule's March 20 effective date. But if the Tribes are allowed in just before the deadline, then the parties will not have time to complete briefing on the Tribes' opposition to the motion for preliminary injunction before the effective date—and the Court would have next to no time to provide a complete decision. Without the Court's pre-effective-date intervention, the rules of the game will detrimentally change for the States on March 20. *See* Tr. at 55, *Kentucky v. EPA*, No. 3:23-cv-00007-GFVT (E.D. Ky. Mar. 13, 2013), ECF 45 ("THE COURT: What practically happens on March 20th? [DOJ ATTORNEY]: Well, Your Honor, at that point the rule would go into effect and people would need to start assessing jurisdiction under the rule versus the status quo."). The Court has already said that "[a]llowing the briefing schedule to conclude after the final rule takes effect would be

prejudicial to the Plaintiffs." ECF 90 at 2. But in practical effect, the Tribes are asking the Court to allow that very same schedule shift here.

At bottom, as the States explained in their related motion to strike,[1] a court must consider how a proposed intervention "may prejudice the existing parties." *Planned Parenthood of the Heartland v. Heineman*, 664 F.3d 716, 718 (8th Cir. 2011). The States and the Agencies had figured out a way to brief the preliminary-injunction motion efficiently and expeditiously. That briefing is now complete. Whatever the ultimate merits of the Tribes' separate intervention motion might be, allowing the Tribes to jump into the middle of the preliminary-injunction issue and upset those dates, directly or indirectly, would cause real prejudice. *Cf. FTC v. BF Labs, Inc.*, No. 4:14-CV-00815-BCW, 2014 WL 11173797, at *2 (W.D. Mo. Oct. 3, 2014) (denying intervention where the case was "in the early stages" and intervention promised to merely complicate the proceedings). Courts have recognized as much in denying motions to intervene brought during preliminary-injunction proceedings. *See*, *e.g.*, *FTC v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 3290461, at *4 (D. Ariz. Aug. 2, 2021); *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12-22958-CIV, 2013 WL 4786829, at *2 (S.D. Fla. Sept. 6, 2013); *Salt Lake Trib. Publ'g Co., LLC v. Mgmt. Plan., Inc.*, No. 2:03-CV-00565 PGC, 2007 WL 9805543, at *4 (D. Utah Feb. 13, 2007).

For these reasons, the Court should deny the Tribes' motion to accelerate briefing and to expedite consideration of their motion to intervene.

Dated: March 14, 2023

[1] The States do not intend to file a reply in support of that motion, so as not to further delay the proceedings or burden the Court.

Respectfully submitted.

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